IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 72 of 2002

with

SECOND APPEAL No 73 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JITENDRAKUMAR AMRUTLAL SHAH

Versus

GHEVAR

Appearance:

1. Second Appeal No. 72 of 2002
   MR NIKHIL S KARIEL for Petitioner No. 1
   PARTY-IN-PERSON for Respondent No. 1
2. Second Appeal No. 73 of 2002
   MR NIKHIL S KARIEL for Petitioner No. 1
   PARTY-IN-PERSON for Respondent No. 1

CORAM : MR.JUSTICE D.A.MEHTA

Date of decision: 10/04/2003

COMMON ORAL JUDGEMENT

1. Second Appeal No. 72 of 2002 has been filed against the judgment dated 3rd May 2002 delivered by the District Court, Kheda at Nadiad in Regular Civil Appeal No. 132 of 2001, which arises out of the judgment dated 15th February 2000 delivered by the Court of Civil Judge, Junior Division, at Petlad in Regular Civil Suit No. 289 of 1994.

1.1 So far as Second Appeal No. 73 of 2002 is concerned, the same arises out of the judgment in Regular Civil Appeal No. 131 of 2001 which came to be filed against the judgement in Regular Civil Suit No. 43 of 1997. The dates of the judgment of the trial Court and the first appellate Court are the same as mentioned in relation to Second Appeal No. 72 of 2002.

2. The appellant in Second Appeal No. 72 of 2002 is the original plaintiff, viz. Shri Sanatan Jain Dharam Shrimad Rajchandra Ashram, Agas while in Second Appeal No. 73 of 2002, the appellant is the original plaintiff who is the president of Shrimad Rajchandra Mumukshu Mandal, which is an association of the followers of Shrimad Rajchandra.

3. It appears that the plaintiffs filed the respective suits as according to them, the defendant, i.e. the present respondent, was intentionally committing breach of the rules of the Ashram with specific reference to rule No. 22 (2) and rule No. 18 of the Scheme of the Ashram. Accordingly, relief was sought by the plaintiff seeking declaration and perpetual injunction to the effect that the defendant may not be permitted to enter or live in the properties belonging to the Ashram. The trial Court decreed both the suits, and granted relief as prayed for, against which the defendant, the present respondent herein, preferred appeals before the Court of District Judge, Kheda at Nadiad. The first appellate Court, for the reasons stated in its impugned judgment, remanded the matter to the trial Court with directions to the trial Court to frame additional issues as directed by the first appellate Court. It is against the aforesaid order of remand and direction that these appeals have been preferred.

4. On 19th June 2002, this Court (Coram: R.R. Tripathi, J.) admitted the appeals and framed the following four questions of law, which are common in both the appeals:

"(a). In the facts and circumstances of the case whether the learned First Appellate Court should have remanded the matter back when it was apparent that the respondent had not appeared to defend his case as his application for transfer to a different court had not been considered.

(b). In the facts and circumstances of the case, whether the learned First Appellate Tribunal should have remanded the matter back when the respondent who is so vigilant to challenge interim injunction granted to the plaintiff upto the Honourable Supreme Court does not remain present at the stage of recording evidence.

(c). In the facts and circumstances of the case whether the learned First Appellate Tribunal should have remanded the matter back when during the trial the respondent had not challenged the evidence led on behalf of the original plaintiff and as a general rule unchallenged evidence deserves to be believed.

(d). In the facts and circumstances of the case, whether the learned First Appellate Tribunal should have remanded the matter back while being influenced by the existence of interim injunction granted in favour of the original plaintiff, appellant herein.

5. Thereafter, it appears that at the time of hearing of the Civil Application for interim relief, an attempt had been made by the Court to explore the possibilities of an amicable solution between the parties. In this direction, as directed by the Court, ex-managing trustee, a trustee, a manager, the president of Mumukshu Mandal, Govindbhai Lalbhai Patel, and certain other members of the Mumukshu Mandal were present before the Court. However, ultimately no settlement could be arrived at between the parties, and this is what has been observed by this Court in its order dated 26th June 2002 passed in Civil Applications No. 4125/02 and 4127/02:

"4. The matter was discussed in detail. Having heard the parties, it is felt that

amicable solution to the problem is not possible. The trustee, Surendrabhai present before the Court, is though related to the respondent submitted that earlier amicable settlements were made but they miserably failed only on account of non observance of the same on the part of the respondent. The ex-managing trustee and the trustee have narrated the history of the case and stated that in the past in the presence of the son(s) of the respondent, a compromise was arrived at, but soon thereafter, he has committed breach of the same.

5. From the reply which is given today, it is clear that the respondent is having no willingness to abide by the rules and regulations of the Ashram. In fact he has narrated in the reply that he himself is not less than 'Christ' and so far as `the service' of the down trodden is concerned, he is no less than "Mother Teressa". He has also stated that he is such a staunch follower of Shrimad Rajchandra that, such a person is never born for last 110 to 120 years and is not likely to born in future also.

6. From the perusal of the reply it is clear that the respondent is a psychic and is suffering from same psychological disorder and therefore, amicable solution to the problem is out of question.

7. The Second Appeals are already admitted. The prayer made in Civil Application No. 4125 of 2002 to stay operation, execution and implementation of the judgment of Extra Assistant Judge, Kheda at Nadiad in Regular Civil Appeal No. 132 of 2001 was granted. The same shall continue till the final disposal of the Second Appeals. Rule is made absolute."

6. Thereafter the matters were directed to be listed for final hearing in the light of the fact that the respondent, who is appearing as party-in-person, is aged about 86 years.

7. The case of the appellant [original plaintiff] is that the appellant Trust is registered under the Bombay Public Trust Act with aim and object to ensure that followers of Shrimad Rajchandra obtain correct religious understanding. For this purpose, a scheme has been formulated to ensure good administration and to take care

of the properties of the Trust which are situated in village Agas, Tal. Petald, District Kheda. The properties of the Trust comprise of various buildings which are used for devotional activities, prayers, lectures as well as residential building wherein devotees and followers who believe and follow the teachings of Shrimad Rajchandra are permitted to reside; that as per the scheme of administration and the rules framed therein, so as to ensure an orderly functioning of various activities of the trust, the devotees are required to follow the rules and regulations which have been framed by the founder of the Ashram, Shri Laghuraj Swami. One of the conditions stipulate that the devotees and followers are not permitted to carry on any activities other than worship of God and follow the teachings of Shrimad Rajchandra.

8. The respondent herein [original defendant] is residing in House No. 74, which admittedly has been constructed by the sons of the respondent and donated to the Ashram. On this count, there is no dispute between the parties.

9. It appears that in past a dispute had arisen between the appellants and the respondents and the appellants had filed Regular Civil Suit No. 228 of 1982 wherein a compromise had been struck between the parties on 11th September 1986. The case of the appellant-plaintiff is that despite such compromise arrived at between the parties, the respondent-defendant intentionally continue to breach the rules of the Ashram and hence they were constrained to act. Accordingly, on 16.1.1994, the Trustees of the Ashram called and warned the defendant-respondent but as there was no improvement in the conduct of the respondent, once again, on 11th September 1994, a joint meeting was held between the trustees and the defendant wherein the defendant was specifically asked to desist from carrying on activities against the rules of the Ashram. It is further the say of the appellants that as there was no improvement, on 12th October 1994, the Ashram's body held a meeting, and by a circular resolution, it was resolved that in the opinion of the body if the defendant is permitted to reside any longer in the Ashram, the reputation of the Ashram would suffer and there would be disturbances in the daily activities of 'satsang' and worship. As a consequence of this opinion, by the same resolution dated 12th October 1994, the defendant was directed not to enter or reside within the Ashram limits by virtue of Rule No. 22 (2) and 18 of the Scheme. It is the say of

the plaintiff that despite the said resolution, the defendant was trying to enter the premises falling within the periphery of the Ashram and continuing with the activities which would lead to loss of reputation so far as the Ashram was concerned. It was in these circumstances that the Civil Suits came to be filed seeking perpetual injunction.

10. The first appellate Court took into consideration the case of the defendant as regards merits of the dispute between the parties. It was stated by the defendant, who appeared as party-in-person before the first appellate Court that he had preferred suit No. M/19/94 on 31st January 1994 against the Trustees of the Ashram before the Assistant Charity Commissioner, Baroda on the ground that the Trustees themselves were responsible for committing breach of rules and had no authority to take any action against the defendant. It is further the say of the defendant that it was with a view to counter this proceedings that the Trustees had passed the aforesaid circular resolution.

11. The first appellate Court has categorically recorded that the defendant did not lead any evidence but even at the time of recording of the evidence on behalf of the plaintiffs, the defendant remained absent and the deposition of the witnesses appearing on behalf of the plaintiffs remained uncontroverted as no cross-examination had been carried out. The first appellate Court framed the following issues, and answered the same as under:-

"13. 1. Whether the impugned judgment and decree passed by the learned trial court in R.C.S. No. 289/94 and 43/97 are illegal, perverse, null & void and erroneous?

2. What order?

14. My findings on the above points are as under:

1. Not survive as matter requires to be remanded as per discussion.

2. As per final order.

12. The first appellate Court has observed that as the lawyer of the defendant did not remain present, the

defendant had no chance to defend his case. According to the first appellate Court, as the worship and inhabitance of the defendant was at stake, so as to avoid miscarriage of justice, the matter requires to be remanded. In these circumstances, the first appellate Court formulated three issues as additional issues which were required to be heard, dealt with and decided by the trial Court in the opinion of the appellate Court. The said three issues read as under:-

"1. Whether alleged activities of the defendant carried by defendant in suit house are against the rules and regulations of the Ashram as contended by the plaintiff?

2. Whether defendant by his mischievous or annoying behaviour as alleged or by alleged activities carried by him at suit house is causing nuisance and annoyance and is spoiling peaceful atmosphere at the Ashram as contended by the plaintiff?

3. Whether defendant has right to remain in possession of suit house No. 74 and has right to reside in suit house no. 74 as claimed by the defendant?

13. It is in this context that both the suits were remanded to the trial Court for deciding the suits afresh along with determination of additional issues framed by the appellate Court.

14. At the hearing of the Second Appeals, the respondent has appeared as party-in-person and has placed on record three sets of written submissions. Apart from reiterating various points which were raised by him in his written statement before the trial Court as well as submissions before the first appellate Court, it has been contended that issue be decided finally by this Court and the order of remand must not be confirmed as he does not wish to face a second trial by way of prolonged litigation.

15. The case of the appellant against the order of remand is that the respondent, in his appeal before the first appellate Court, had challenged the judgment of the trial Court only on merits, and no grounds as regards non-availability of adequate opportunity had been raised; that the defendant had not appeared before the trial Court of his own volition at the stage of recording evidence nor has provided any reason for his absence

which would justify granting him another chance; that non-appearance of the advocate of the defendant before the trial Court had no connection whatsoever with the strike of the lawyers because, firstly, the evidence had been recorded on the dates when the Court and the lawyers were functioning, and, secondly, the defendant had appeared as party in person before the trial Court, and, therefore, this ground, which was the basis of remanding the matter, was besides the point; that the defendant had applied for transfer of the case, but as no order had been passed, the trial Court had proceeded with the recording of evidence and deciding the lis between the parties; that this action of the trial Court had been upheld by the appellate Court by stating that the trial Court is not bound to stay the proceedings simply on an application for staying the proceedings or transfer of proceedings initiated or filed by either party. However, in the same breath, the appellate Court had observed that as ad-interim injunction was already operating in favour of the plaintiffs, the trial Court could have waited till the application for transfer was decided. This, according to the appellants, was an incorrect premise on which the trial Court proceeded to base its decision. It was further stated that the defendant had not challenged the evidence lead by the plaintiff at the trial, and as the same remained uncontroverted, it had to be accepted and the appellate Court was in error in granting another opportunity when none was asked for.

16. The first question which requires to be dealt with is: Whether the first appellate Court could have remanded the matter when it was apparent that the defendant had not appeared only because his application for transfer of proceedings to a different Court had not been considered? A party to a proceedings is entitled to prefer an application for transfer of the proceedings to a different Court provided the said party apprehends that it may not get justice at the hands of the Court in which the proceedings are taking place but in support of such an allegation, the applicant is required to place on record necessary, reliable and cogent evidence in this regard. In case an application is made and the same is pending, it would not be open to the applicant to refrain from participating in the proceedings merely because the application for transfer of proceedings is pending, and the discretion is always available with the Court, whether to proceed with the hearing or to await the outcome of the application. In a given case where the court proceeds to hear and decide the matter, it would be open to the aggrieved party to raise the said issue in an appropriate appellate or revisional forum as permissible

in law, and once again reiterate its apprehension and substantiate the same. However, merely because the Court does not wait for the decision on an application for transfer of proceedings, that by itself would not be sufficient to empower the appellate Court to exercise power of remand without anything more being available on record.

17. On facts, it is apparent that the defendant did not appear before the trial Court only on the ground that his application for transfer of proceedings to another Court was pending. There is no dispute on this count. If this is the position on facts, in the light of what is stated hereinbefore, the appellate Court could not have remanded the matter back especially in the light of the fact that the appellant before it, viz. defendant, had not even made a grievance to that effect. In fact the appellant before the first appellate Court conducted the appeals on merits of the dispute between the parties, without raising any point or joining issue as regards recording of evidence by the trial Court in his absence. Once the original defendant had chosen out of volition to remain absent at the stage of recording of evidence before the trial Court, the appellate Court could not have exercised power of remand on its own, without any grievance before the appellate Court by the aggrieved party or without recording the reasons to the effect that it was not possible to decide the appeal on the facts and evidence which were available on record.

18. The second question is, once again, in relation to power of the appellate Court to remand the matter in the light of the circumstances that the defendant had challenged the order of interim injunction granted in favour of the plaintiff right upto the Apex Court, and yet remaining absent before the trial Court at the stage of recording evidence.

19. The trial Court passed an order of ad-interim injunction in favour of the plaintiffs and the defendant was restrained from entering within the boundaries of the Ashram complex. The said order was challenged by the defendant by way of appeal, and the order of the trial Court came to be confirmed. The said order of the appellate Court was challenged by way of Revision before this Court and this Court confirmed the order of the trial Court and the appellate Court, and rejected the Revision Application. The defendant carried the matter further but did not succeed before the Supreme Court. In this backdrop of facts and circumstances, when the defendant took a conscious decision to abstain at the

stage of recording of evidence, it cannot be said to be a case where he was not granted full and adequate opportunity to either cross-examine the witnesses on behalf of the plaintiff or rebut the evidence lead on behalf of the plaintiff or in any manner objected to the evidence which was led from the plaintiff's side. In these circumstances, the appellate Court could not have exercised its power of remand under section 107 of the Code of Civil Procedure.

20. The entire conduct of the defendant would go to show that the defendant had realized, possibly, that once the order of interim injunction had been confirmed right upto the Supreme Court, the defendant was not in a position to lead any evidence as to how and in what manner the resolution passed by the Trust was illegal or invalid so as to permit the defendant to challenge the same when the trial was conducted and the parties were heard in the suit. Be that as it may, the fact remains that the defendant having accepted to stay away from the stage of recording of evidence, it was not open to the first appellate Court to thrust an opportunity on the defendant when in fact the defendant himself had not sought any such opportunity before the first appellate Court.

21. The third question again relates to the exercise of power of remand by the appellate Court in the context of the evidence led on behalf of the plaintiff remaining uncontroverted. As already observed hereinabove, the evidence led on behalf of the plaintiff was not rebutted on the side of the defendant nor was any attempt made to lead any evidence to the contrary from the defendant's side. In these circumstances, the position in law is well settled that the evidence which has come on record in accordance with law and remains unchallenged, has to be accepted by the trial Court, unless and until there is something to rebut the said evidence on record. In the present case, there is no dispute as to the fact that the evidence led on behalf of the plaintiff has remained unchallenged and first appellate Court has not recorded anything in its judgment to show that the said evidence was even sought to be controverted at the appellate stage, or that the defendant sought to place on record some additional material so as to controvert the evidence which had already come on record. In these circumstances, the appellate Court could not have exercised the power of remand in the manner it did under the guise of granting an opportunity to both the sides to place further evidence on record.

22. The last question which falls for consideration is: whether it was open for the appellate Court to take recourse to existence of interim injunction granted in favour of the plaintiff for the purpose of exercising power of remand and justify exercise of power on the basis of such order of interim injunction?

23. The appellate Court has, in justification of its order of remand, stated that as interim injunction continue to operate in favour of the plaintiff, no prejudice would be caused to the plaintiff if order of remand was made, and at the same time, the order of interim injunction was directed to continue to operate. The concept of interim injunction is that a party should not be permitted to create a situation whereby, at the end of the trial, when the suit is decreed in favour of the other party, the decree remains a paper decree and the party in whose favour the decree is made is virtually left remediless. However, once such interim injunction has been granted, it cannot be used as a tool to prolong the litigation by continuing the proceedings which otherwise ought to have come to an end after hearing is over and order is made, and in this direction the power of remand cannot be exercised to do what would not be permissible otherwise, i.e. to prolong the litigation without any necessity. In the facts and circumstances of the present case, at the cost of repetition, it needs to be stated that neither party had sought before the appellate Court any further opportunity for leading evidence, and if this be so, merely because order of interim injunction was operating in favour of the plaintiff, the appellate Court could not have created a situation whereby despite the fact that the decree was in their favour, the plaintiff was prevented from executing the same.

24. Therefore, to sum up, all the four substantial question of law are required to be answered to the effect that the first appellate court was in error in remanding the matter back in the context of the fact that defendant had merely moved an application for transfer of proceedings or the fact that the defendant remained absent at the stage of recording of evidence out of volition despite the fact that the order of interim injunction had been unsuccessfully challenged upto the Supreme Court; the fact that the evidence lead on behalf of the plaintiff had remained uncontroverted; and, lastly, the operation of the order of interim injunction in favour of the plaintiff cannot be used as a basis for such exercise of power.

25. Though no substantial question of law was raised when the matter was admitted: whether it was open to the appellate court to frame additional issues in the facts and circumstances of the case: this question is also required to be decided as the same also forms a substantial question of law which requires to be answered. The first and second additional issues framed by the appellate court form part of issue No.1 framed by the trial Court and are merely aspects of the same controversy. The trial Court has raised the issue as to whether the plaintiff is able to prove that the defendant has committed breach of the rules and the scheme of the Ashram and hence has no legal right to enter the Ashram premises. The additional issues framed by the first appellate Court state whether the activities as allegedly carried by the defendant are against the rules and regulations of the Ashram and whether the conduct of the defendant is mischievous or annoying so as to cause nuisance and spoil the peaceful atmosphere of the Ashram. The entire basis of the suit, that the defendant had committed breach of the rule of the Ashram is founded on this fact, viz. the behaviour and conduct of the defendant. Hence there was no occasion or requirement by the appellate Court, in the facts and circumstances of the case, to raise the so called additional issues.

26. Similarly, the additional issue as to whether the defendant had a right to possess and reside in suit House No. 74 as claimed also does not require to be decided as an independent issue because it is an admitted position between the parties, and the appellate Court has in no uncertain terms recorded the same, that the suit house was constructed by the sons of the defendant and donated to the Ashram and was admittedly property of the Ashram. Once it was held by the Court and the position was accepted by the parties that the property belongs to the Ashram, the issue stood settled and covered by the larger issue as to whether the defendant was entitled to enter the Ashram complex and occupy and use properties of the Ashram. Hence even this issue could not have been framed as an independent issue.

27. This aspect has been dealt with by me in detail though not raised by the parties, only to ensure whether the exercise of power of remand was warranted even by way of requirement of a decision as regards the additional issues framed by the first appellate Court.

28. In light of what is stated hereinabove, both the Second Appeals require to be allowed. The judgment and order dated 3rd May 2002 passed by the Assistant Judge,

Kheda at Nadiad in Regular Civil Appeals No. 131 of 2000 and 132 of 2000 is held to be bad in law, against the facts and evidence on record, and is hereby quashed and set aside. The judgment and order dated 15th February 2000 delivered in Regular Civil Suit No. 289/94 and 43/97 by the Court of Civil Judge, Junior Division, Petlad is held to be holding the field.

The appeals are allowed accordingly.

[D.A. MEHTA, J.]

mathew